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RECEIVED

JUL 29 2004

 WATER RIGHTS
SALT LAKE

HAND DELIVERED

Mr. Jerry Olds
Utah Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, Utah 84111-6300

Re: Bear River Canal Company Priority Water Rights

Dear Mr. Olds:

I am writing on behalf of Bear River Canal Company (the "Canal Company").

The Canal Company has been informed by PacifiCorp that the Utah Small Irrigators have now used their entire 2004 allocation of Bear Lake storage water and that all storage water deliveries to them have ceased. The Canal Company is now the only contract holder with PacifiCorp, which diverts in Utah, that has Bear Lake storage water remaining available.

Moreover, under the final decree of the Court in the case *Utah Power & Light Company v. Richmond Irrigation Company*, First Judicial District Court, Cache County, State of Utah, dated February 21, 1922 (the "Kimball Decree"), the Canal Company holds March 1, 1889 priority water rights for 333 c.f.s. of natural flow in the Bear River. This right is senior in priority to the natural flow water rights of all other Utah users of supplemental storage water out of Bear Lake with the exception of miscellaneous rights totaling approximately 5.0 c.f.s.

The Canal Company's decreed priority is clearly enforceable under Utah law. The fundamental tenet of the prior appropriation doctrine of water law, as codified in Utah, is that:

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“Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right.” §73-3-21, Utah Code Annotated, 1953, as amended. Therefore, by law, only those irrigators with water rights having a priority equal to or earlier than March 1, 1889, may now divert and use water from the Bear River without unlawfully infringing upon the senior priority natural flow water rights of the Canal Company and/or its remaining supplemental Bear Lake storage water supply.

The Canal Company hereby respectfully demands that the State Engineer immediately regulate and enforce the diversion and use of water under water rights in Bear River, according to priority, between the Utah-Idaho State line and the Canal Company's headgate, and that it officially take such action as shall be necessary to shut-off all pumps and close and lock-off all head gates and other structures of all water users who unlawfully divert and use water from the Bear River out of priority or without right.

The State Engineer's authority in this matter is clear.

§73-2-1(3)(b)(ii) provides that:

(b) The state engineer shall have the power to:

(ii) secure the equitable apportionment and distribution of water according to the respective rights of appropriators...

§73-5-3, Utah Code Annotated, 1953, as amended, provides that:

The state engineer and his duly authorized assistants *shall carry into effect* the judgments of the courts in relation to the division, distribution or use of water under the provisions of this title. The state engineer *shall* divide, or cause to be divided, the water within any district created under the provisions of this title among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and

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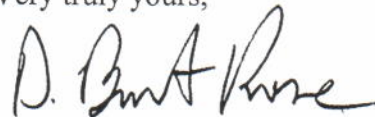
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controlled, the use of such water by such closing or partial closing of the head gates, caps, valves or other controlling works of any ditch, canal, pipe, flume, well or tunnel, or other means of diversion as will prevent ... its use in excess of the quantity to which any appropriator is lawfully entitled.... (Emphasis added.)

According to the foregoing, the State Engineer not only has the authority under §73-2-1(3)(b)(ii), but in this case the statutory *obligation* under §73-5-3 to carry into effect the dictates of the Kimball Decree by regulating the Bear River in such a manner as to protect and enforce the senior priority rights of the Canal Company as adjudicated in the decree. The judgment rendered by the court in the Kimball Decree remains in full force and effect, and it is the position of the Canal Company that the decree can and must be enforced by the State Engineer now without the necessity of further court action.

The water situation on the Bear River is very precarious this year, and particularly at this point in the irrigation season. This is a matter of utmost importance to the Canal Company.

Very truly yours,



D. Brent Rose

cc: Robert Fotheringham
Larry Anderson
Karl Dreher
Jack Barnett
Jerry Kinghorn
Randy Budge
Jody Williams
Dan Davidson

Bear River Water Users Association
Marcus Gibbs
Joseph Larsen
Gale Moser
Charles Holmgren
Jim Watterson
Steve Meek